CDAS

March 5, 2024

VIA ECF
The Honorable Sarah Netburn
S.D.N.Y. Thurgood Marshall Courthouse
New York, NY 10007

Re: *Lynne Freeman v. Tracy Deebs-Elkenaney et. al.*, 1:22 Civ 02435 (LLS)(SN)

Dear Judge Netburn:

Defendants respectfully respond to Plaintiff's March 4, 2024 letter ("Pl.'s Letter," ECF 349), which asks that Defendant's supplemental evidence motion ("Supp. Evid. Br.," ECF 344) be stricken.

The supplemental evidence motion should not be stricken. Rather, it was necessitated after Plaintiff filed an expansive second Rule 56.1 statement ("ASUF," ECF 332 pp. 70-133) and three new expert declarations (ECF 333, 334, 336) with her summary judgment opposition/reply papers. Defendants were entitled to object and demonstrate why those new submissions are improper and should be stricken. (*See* Supp. Evid. Br. §§ I, II (showing that the new ASUF is irrelevant, wasteful, and violates the Scheduling Orders and Rule 56.1, and that the new expert opinions are similarly inadmissible).) Simply put: if Plaintiff hadn't violated the Scheduling Orders and Rule 56.1 by submitting a second affirmative statement of facts and three new expert opinions, Defendants wouldn't have needed to move to strike them.[1]

A supplemental motion regarding evidentiary issues was an appropriate mechanism for this. The admissibility of evidence must be resolved as a threshold issue at summary judgment, *e.g.*, *Capitol Recs., LLC v. Escape Media Grp., Inc.*, 2014 WL 12698683, at *4 (S.D.N.Y. May 28, 2014), and parties commonly address evidence admissibility in separate objections or motions to strike. Contrary to Plaintiff's argument (Pl.'s Letter at 2), Defendants were not required to dedicate valuable space in their copyright reply brief to admissibility issues that Plaintiff unilaterally created with her extraneous submissions. Plaintiff also moved to strike certain of Defendants' evidence with her opposition/reply (ECF 332 ¶¶ 26, 28, 30, 31), and Defendants were entitled to respond (Supp. Evid. Br. § III), just as Plaintiff previously did (ECF 328). Plaintiff also has argued at length regarding evidentiary issues outside the merits briefing (*see, e.g.*, ECF 332 pp. 10-18), so her assertion that the parties cannot address evidence issues separately is baffling.

Finally, the Court previously permitted Defendants to file a 20-page copyright reply brief and a 10-page state-law reply brief. (ECF 294.) It is unclear why Plaintiff believes these page limits were each 15 pages. (Pl.'s Letter at 1.) Plaintiff also points out that "[t]he parties have filed well over a thousand pages of material" (*id.* at 2), but Plaintiff is the primary cause of this. Lynne Freeman's voluminous similarity "indexes" and Plaintiff's reiteration of them in the ASUF (not to

[1] Plaintiff argues in a footnote that the statements in her ASUF should be deemed admitted. (Pl.'s Letter at 1 n.1.) That is erroneous. The ASUF should be stricken and Defendants in any event denied every statement therein (ECF 345 at 1-2).

mention her six initial expert opinions in a copyright case involving YA books) collectively constitute an outsized portion of the material filed.

Defendants defer to the Court on whether an additional response from Plaintiff on evidentiary issues would be useful, but Defendants' supplemental evidence motion was necessitated after Plaintiff improperly submitted new evidence and should be granted, not stricken.

Thank you for your time and attention to this matter.

Respectfully submitted,

COWAN DEBAETS ABRAHAMS & SHEPPARD, LLP

By: /s/ Nancy E. Wolff
Nancy E. Wolff
Benjamin S. Halperin
CeCe M. Cole
41 Madison Avenue, 38th Floor
New York, New York 10010
Telephone: (212) 974-7474
Fax: (212) 974-8474
nwolff@cdas.com
bhalperin@cdas.com
ccole@cdas.com
Attorneys for Defendants Tracy Deebs-Elkenaney p/k/a Tracy Wolff, Entangled Publishing, LLC, Holtzbrinck Publishers, LLC d/b/a Macmillan, and Universal City Studios LLC

Lacy H. Koonce, III
KLARIS LAW PLLC
430 West 14th Street
New York, NY 10014
Phone: (917) 612-5861
lance.koonce@klarislaw.com
Attorneys for Emily Sylvan Kim and Prospect Agency, LLC

Dwayne K. Goetzel
Texas State Bar No. 08059500
KOWERT, HOOD, MUNYON, RANKIN & GOETZEL, P.C.
1120 S. Capital of Texas Hwy.
Building 2, Suite 300
Austin, Texas 78746
Telephone: (512) 853-8800

Facsimile: (512) 853-8801
dgoetzel@intprop.com
Attorneys for Defendant Tracy Deebs-Elkenaney p/k/a Tracy Wolff